No. 91-2051

In the Supreme Court of the United States

OCTOBER TERM, 1992

SOUTH DAKOTA, PETITIONER

v.

GREGG BOURLAND, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Cheyenne River Sioux Tribe has any authority to regulate non-Indian hunting and fishing on lands and waters that are within its Reservation and that were acquired by the United States for a dam and reservoir pursuant to the Cheyenne River Oahe Act of 1954.

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INTEREST OF THE UNITED STATES

The United States has a longstanding interest in questions of tribal regulatory jurisdiction because of its special relationship with Indian tribes and its experience and expertise in Indian law matters. In addition, the United States has a particular interest in the subject matter of this case. The United States is the owner of the lands at issue, and resolution of the question presented turns on the legal effect of the acquisition of those lands by the United States. The outcome of this case also could affect tribal authority to regulate non-Indian hunting and fishing at a number of other federally owned sites located within Indian reservations.

STATEMENT

This declaratory judgment action was brought by the State of South Dakota to challenge the authority of the Cheyenne River Sioux Tribe to regulate hunting and fishing by nonmembers of the Tribe on certain lands within the Cheyenne River Reservation that are owned by the United States.

1. a. The present-day Cheyenne River Reservation lies in north-central South Dakota, bordered on the east by the Missouri River. The Fort Laramie Treaty of 1868, 15 Stat. 635, established the boundaries of the Great Sioux Reservation, which included all of South Dakota west of the Missouri River. Under Article II of the Treaty, the reservation lands were "set apart for the absolute and undisturbed use and occupation" of the Sioux Tribes. 15 Stat. 636. Article II also provided that "no persons except those herein designated and authorized so to do * * * shall ever be permitted to pass over, settle upon, or reside in the" Reservation. *Ibid.*

In 1889, Congress removed substantial lands from the Great Sioux Reservation created by the Fort Laramie Treaty of 1868 and divided the balance into five separate reservations, one of which was the Cheyenne River Reservation. Act of March 2, 1889, ch. 405, § 4, 25 Stat. 889. The Act expressly provided "[t]hat all the provisions of [the Fort Laramie Treaty of 1868] * * * not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation." § 19, 25 Stat. 896. The Act also authorized the President to make allotments of land within the Reservations to individual Indians. § 8, 25 Stat. 890. Some of the allotted parcels on the Cheyenne River Reservation were later acquired by nonmembers of the Cheyenne River Sioux Tribe through sale or inheritance. Subsequently, some of the unallotted and surplus lands on the Reservation were sold to nonmembers pursuant to the Act

of May 29, 1908, ch. 218, 35 Stat. 460; see *Solem* v. *Bartlett*, 465 U.S. 463, 472-476 (1984).

Today, the Reservation consists of approximately 2,800,000 acres of land. About half of the total Reservation acreage is held by the United States in trust for individual Indians or for the Tribe. Pet. App. A67, A71. In addition, more than 100,000 acres of lands that had been held in trust (the "taken area" at issue in this case) were acquired by the federal government in 1954 for construction of a dam and reservoir. *Id.* at A10-A11 & n.9; see pages 3-5, *infra*.[1] The balance of the land in the Reservation is owned in fee by nonmembers of the Tribe, except for 18,000 acres of such fee lands that were acquired by the United States in 1954 for the dam and reservoir. Pet. App. A71. The trust lands are located throughout the Reservation, but are concentrated along the Missouri and Cheyenne Rivers, where the taken area is also located. *Id.* at A72. The district court found that "[v]irtually all the land adjacent to the [federal lands] is trust land." *Id.* at A77; see map appended to Brief for the Respondents. Indians constitute 58% of the population of the two South Dakota counties within which the Reservation is located. *Id.* at A72.

b. In 1944, Congress authorized establishment of a comprehensive flood control plan along the Missouri River. See Flood Control Act of 1944, ch. 665, 58 Stat. 887. Seven subsequent statutes authorized limited takings of Indian lands from reservations along the River for specific dam projects. See *Lower Brule Sioux Tribe* v. *South Dakota*, 711 F.2d 809, 813 n.1 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). The largest such taking involved the 104,420 acres taken on the Cheyenne River Reservation by authority of the Act of September 3, 1954, ch. 1260, 68 Stat. 1191 (Cheyenne River Oahe

[1] The United States also acquired approximately 3000 acres that were owned in fee by tribal members. See Pet. Br. 3.

Act). See Pet. App. A131. The bottom lands taken for the Oahe Dam and Reservoir were the most valuable lands possessed by the Tribe. *Id.* at A141. Congress appropriated $10,644,014 for the taken lands and interests therein, and for rehabilitation of the Indians and restoration of their tribal life. Cheyenne River Oahe Act, §§ 2, 5, 68 Stat. 1191, 1192.

A number of provisions of the Cheyenne River Oahe Act were designed to minimize the impact of the taking on the Tribe and to preserve substantial tribal interests in the taken lands. For instance, in Section 5 of the Act, the United States agreed to provide funds to be "expended upon the order and direction of the Tribal Council," such that "the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in." 68 Stat. 1192. Section 6 provided that all mineral rights in the taken area were reserved to the Tribe or tribal members, and could be exploited subject to reasonable regulation for the protection of the dam and reservoir project. 68 Stat. 1193. Section 7 gave members of the Tribe rights to remove timber and to salvage improvements within the taken area until the gates of the dam were closed. 68 Stat. 1192. Section 9 allowed members of the Tribe to continue to reside on the taken land until closure of the dam. 68 Stat. 1192. Section 10 preserved for the Tribe and its members the right to graze stock within the taken area after closure of the dam, 68 Stat. 1193, and Section 8 provided that the United States would take protective measures to minimize losses to Indian livestock from the rise and fall of the reservoir. 68 Stat. 1192. Section 10 also preserved for the Tribe and its members "the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States." 68 Stat. 1193.[2]

c. The district court found that subsistence hunting and fishing, though not widely practiced by tribal members, "is an important cultural, social, and religious activity" for them. Pet. App. A74-A75. It furthers traditional tribal values, under which able-bodied members are exhorted to care for the needy, weak, and elderly, and it "honors a fundamental Lakota philosophy of courage, wisdom, and generosity." *Ibid.* The court found, however, that tribal regulation of hunting and fishing is not necessary at this time to ensure the continued ability of tribal members to engage in subsistence hunting and fishing. *Id.* at A75-A77.

The district court also found that "[t]he Tribe has always asserted jurisdiction over all hunting and fishing activities on the reservation, including nonmember fee lands and the taken area," and has never acquiesced in "State assertion of jurisdiction over hunting and fishing activities on the reservation." Pet. App. A72; see also *id.* at A137. Shortly after passage of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, the Tribe enacted ordinances, approved by the Bureau of Indian Affairs, which required nonmembers to obtain a tribal permit to hunt or fish on the Reservation. Pet. App. A73. Although the Tribe made "signifi-

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[2] The Army Corps of Engineers has promulgated regulations governing public use of water resource development projects, including the Oahe Reservoir. See 36 C.F.R. Pt. 327. They govern, *inter alia*, the operation of vehicles, vessels, and aircraft, 36 C.F.R. 327.2-327.4; provide for swimming, picnicking, hunting, fishing, and trapping except where prohibited, 36 C.F.R. 327.5-327.6, 327.8, and for camping where permitted, 36 C.F.R. 327.7; and provide that the District Engineer in charge of a project may designate visiting hours and restrictions with respect to a portion of a project "when necessitated by reason of public health, public safety, maintenance, or other reasons in the public interest." 36 C.F.R. 327.12(a).

cant" progress in wildlife management in the 1930s and 1940s, in recent years "inadequate funding has prevented the tribe from sustaining an independent and vigorous scheme of wildlife management on the reservation." *Id.* at A81. The State has implemented a "comprehensive wildlife regulatory program" funded by revenues from recreational hunting. *Id.* at A84. The State's program has included stocking fish and monitoring fish populations in the Oahe area. *Id.* at A85-A86.

Prior to this suit, both the Tribe and the State enforced their respective game and fish regulations on the lands in dispute and were usually able to agree on the scope of appropriate regulation. Pet. App. A73. The Tribe enforced its regulations against all violators, while the State limited its enforcement to nonmembers. *Ibid.*

In 1988, the Tribe and the State were unable to agree on appropriate limits for the deer season. Pet. App. A59. The Tribe asserted that the State's proposal "did not adequately protect the grazing permit rights of tribal members" in the taken area. *Id.* at A64. When the Tribe declared that it would refuse to recognize state hunting licenses and would require hunters within the Reservation to obtain a tribal license, see *id.* at A64-A65, the State brought this action. It sought a declaratory judgment that the Tribe may not criminally prosecute nonmembers found hunting on the taken lands, that the Tribe may not exclude nonmembers from hunting on non-trust lands within the Reservation, and that the taking of the tribal lands for the dam and reservoir had *pro tanto* diminished the Reservation. *Id.* at A60.

2. After a trial on the merits, the district court found that the conveyance of the lands to the United States for construction of the dam and reservoir did not affirmatively demonstrate an intent to diminish the Reservation, especially in light of the fact that the Tribe retained grazing, mineral, hunting and fishing, and other rights in the

taken area. Pet. App. A96-A112.[3] Petitioner did not challenge that ruling on appeal, although the court of appeals likewise found it "clear" that "the Cheyenne River [Oahe] Act did not disestablish the boundaries of the Reservation." *Id.* at A21.

On the question of the Tribe's authority to regulate nonmember hunting and fishing, the district court took a different approach. In the district court's view, this Court in *Montana* v. *United States*, 450 U.S. 544 (1981), stated a general rule that an Indian Tribe could exercise jurisdiction over nonmembers on non-tribal land within a reservation—regardless of the circumstances under which the land had been alienated or the identity of the present owner—only "(1) where Congress has expressly delegated jurisdiction to the tribe; (2) where a nonmember has essentially consented to tribal jurisdiction through a business relationship or otherwise; and (3) where the conduct of the nonmember imperils the tribe's political integrity, economic security, or health and welfare." See Pet. App. A113-A114. The district court concluded that none of those conditions was satisfied and that the Tribe therefore could not regulate hunting and fishing by nonmembers on any of the taken lands. *Id.* at A130-A159. The court did not reach the question of the extent of the State's jurisdiction over nonmember hunting and fishing on the taken lands. *Id.* at A115-A118.

3. The court of appeals reversed and remanded, separately analyzing the portion of the taken area that had been held in trust prior to the taking (the former trust lands) and the portion that had been held in fee by non-

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[3] As to lands that had been acquired in fee from non-Indians, the district court recognized (Pet. App. A98-A99) that it was bound by *Solem* v. *Bartlett*, 465 U.S. 463 (1984). *Solem* held that the Act of 1908, opening up some 1.6 million acres of land on the Cheyenne River Reservation to settlement, did not alter the original Reservation boundaries.

member owners prior to the taking (the former fee lands).

With respect to the former trust lands, the court of appeals ruled that the Tribe has authority, subject to the specific limitations found in the Cheyenne River Oahe Act, to regulate nonmember hunting and fishing. The court determined that the purpose of the Act was to construct a dam and reservoir, a purpose that was not inconsistent with continued tribal control and that distinguished this case from *Montana* and *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. App. A26, A36-A37. The court of appeals relied on this Court's decisions in *United States* v. *Dion*, 476 U.S. 734, 738-740 (1986), *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979), and *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 413 (1968), for the proposition that Congress will not be held to have divested a tribe of its treaty rights unless that purpose is apparent from the language and purpose of a statute. Pet. App. A39-A40. Because, as the district court held, Congress had not addressed the question of continued tribal jurisdiction over the taken lands when it passed the Cheyenne River Oahe Act, Pet. App. A39, the court of appeals concluded that the Tribe retained its treaty-based right to regulate nonmember hunting and fishing within the Reservation on the former trust lands. *Id.* at A40-A42.

With respect to the lands—totalling approximately 18,000 acres—that the United States government had acquired from the former fee owners, the court held that *Montana* and *Brendale* were controlling precedents. Pet. App. A43-A45. As had this Court in *Montana*, the court of appeals noted that Congress had not expressly granted the Tribe regulatory authority over nonmembers on the former fee lands, at least insofar as those lands had originally been alienated pursuant to an allotment act

that contemplated elimination of tribal jurisdiction. Pet. App. A44-A45 & n.19. The court remanded for the district court to reconsider whether the Tribe could regulate nonmember hunting and fishing on the former fee lands under one of the exceptions outlined in *Montana* for situations in which non-Indians enter into a consensual relationship with the Tribe or its members, or in which conduct by non-Indians threatens the Tribe's political integrity, economic security, or health and welfare. Pet. App. A46. Although the district court had previously performed such an analysis with respect to the taken area as a whole, the court of appeals determined that the inquiry should be undertaken again, in light of its holding that the Tribe retains regulatory jurisdiction over the former trust lands. *Ibid.*

SUMMARY OF ARGUMENT

Both before and after the former trust lands in this case were taken by the United States for construction of a dam and reservoir, they were part of the Cheyenne River Reservation. Thus, before the 1954 taking, the Tribe had sovereign authority to regulate hunting and fishing by both members and nonmembers on those lands. The question presented in this case is whether the 1954 Cheyenne River Oahe Act, under which the lands were acquired by the United States, entirely deprived the Tribe of the authority it had previously exercised over hunting and fishing by nonmembers.

There are two sources of the tribal regulatory authority in this case: the rights granted to the Tribe in the Fort Laramie Treaty of 1868, and the Tribe's inherent sovereignty. Although the court of appeals largely relied on the Tribe's treaty rights, a finding that the Tribe possesses authority from either source would be dispositive of this case. But regardless of which source is consulted, the Cheyenne River Oahe Act did not entirely divest

the Tribe of its right to regulate nonmember hunting and fishing on the former trust lands.

Insofar as the tribal regulatory authority at issue derived from the 1868 Treaty, the proper analysis rests on the settled rule that statutes will be presumed not to work a deprivation of a tribe's treaty rights unless it is clear from the statutory language itself (or from an examination of its purposes and history) that Congress intended to do so. In this case, no such intent generally to deprive the Tribe of authority over hunting and fishing on reservation land is apparent from the face of the Cheyenne River Oahe Act, which in fact reserved substantial rights for the Tribe and its members on the very lands at issue. Nor can any such intent be inferred from the purpose of the Act, which was to provide for construction of a dam and reservoir, or from its legislative history. Accordingly, the court of appeals correctly held that the Tribe retains jurisdiction to regulate hunting and fishing on the former trust lands by both members and nonmembers, so long as that regulation is consistent with the Cheyenne River Oahe Act and other applicable federal requirements.

Insofar as the Tribe's right to regulate hunting and fishing arose from the Tribe's inherent sovereignty, the analysis is similar. The Tribe's status as a dependent sovereign is not inconsistent with its regulation of hunting and fishing on federal lands, so long as that regulation is consistent with applicable federal statutes and regulations. Indeed, inherent tribal sovereignty has long existed side-by-side with a substantial federal presence on Indian reservations established by federal law. Nor does anything in the Cheyenne River Oahe Act suggest that Congress intended to eliminate the Tribe's rights to regulate hunting and fishing when the United States acquired the property interests of the Tribe and its members in the former trust lands to build a dam and reservoir. The

Tribe's inherent sovereignty thus provides an additional basis for its authority in this case.

The Tribe's continued regulation of hunting and fishing on the former trust lands is entirely consistent with this Court's decision in *Montana* v. *United States*, which held that a tribe may not regulate hunting and fishing by nonmembers on lands within a reservation that had been alienated to individual non-Indians pursuant to allotment acts. The purpose of those acts was the destruction of tribal sovereignty and the ultimate dissolution of the reservations in question. As made clear in the partial plurality opinion in *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, the Court in *Montana* found that it would be inconsistent with that purpose to permit continued tribal regulation of nonmember conduct on private fee lands. In this case, by contrast, no such purpose can be inferred from the statute pursuant to which the land was alienated. Moreover, the land at issue here was not alienated to private parties for their use and occupancy in the manner in which private land is generally held, but to the United States for the special and limited purpose of constructing a dam and reservoir, while preserving important Indian interests and uses.

ARGUMENT

I. THE TRIBE'S PRE-1954 RIGHT TO REGULATE HUNTING AND FISHING BY NONMEMBERS WITHIN THE RESERVATION ON THE FORMER TRUST LANDS WAS NOT ENTIRELY DIVESTED BY THE CHEYENNE RIVER OAHE ACT

Prior to acquisition of the former trust lands by the United States in 1954, the Tribe had authority to regulate hunting and fishing on those lands. That authority was derived from two sources: the Fort Laramie Treaty of 1868, 15 Stat. 635, and the Tribe's inherent authority as sovereign that survived its association with the United

States. Although the Cheyenne River Oahe Act limited the scope of tribal authority to regulate hunting and fishing by nonmembers on the former trust lands, it did not entirely eliminate it.

A. The Cheyenne River Oahe Act Did Not Abrogate the Tribe's Treaty Right to Regulate Nonmember Hunting and Fishing

1. By setting aside the reservation lands for the Tribe's "absolute and undisturbed use and occupation," Article 2 of the Fort Laramie Treaty, 15 Stat. 636, recognized a right in the Tribe to condition nonmembers' use of that land on their obedience to tribal regulations. See *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983); see also *Montana* v. *United States*, 450 U.S. at 558-559; *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 144-148 (1982). The treaty thus confirmed the principle that "Indian tribes are unique aggregations possessing 'attributes of sovereignty over both their members and their territory.'" *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 332 (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980), and *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)). It follows that, prior to 1954, the Tribe had authority under the Treaty of 1868 to regulate hunting and fishing on the former trust lands.[4] The State does not appear to disagree with that proposition.

In 1954, the former trust lands were taken by the United States and compensation was paid to the Tribe

[4] As this Court noted in *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 337 & n.21, Public Law 280, enacted in 1953, 67 Stat. 588, expressly provided that States were not authorized to "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing *or the control, licensing or regulation thereof*." 18 U.S.C. 1162(b) (emphasis added by the Court).

and its members pursuant to the Cheyenne River Oahe Act, ch. 1260, 68 Stat. 1191. Although the State contended in the district court that the 1954 Act removed the federal lands from the Reservation entirely, that contention was rejected by the district court, Pet. App. A96-A112, and not renewed by the State in the court of appeals. The primary question in this case is thus whether the Cheyenne River Oahe Act, and the consequent acquisition of the former trust lands by the federal government, divested the Tribe of all jurisdiction to regulate hunting and fishing by nonmembers on the former trust lands, notwithstanding that the Act did not remove those lands from the Reservation.

2. This Court has frequently confronted claims that a statute abrogates rights granted to an Indian tribe, and the standards governing such claims are well-settled. Congress has the power to abrogate by legislation the treaty rights granted to Indians. See, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 594 (1977); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 566 (1903). But, before such an intent will be found, it is "essential" that there be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States* v. *Dion*, 476 U.S. 734, 740 (1986).[5] Compare *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

[5] A congressional determination to abrogate Indian rights can either be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973). See also *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. at 587, 588 n.4.

In *Dion*, for example, an Indian claimed that his rights under a treaty to hunt bald and golden eagles survived enactment of federal legislation prohibiting such hunting without a special permit issued by the Secretary of the Interior. The Court stated that "[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them," 476 U.S. at 738, and that "Congress' intention to abrogate Indian treaty rights [must] be clear and plain." *Ibid.* Although the Court found that Congress had in fact abrogated the right at issue in *Dion*, that result followed from the Court's conclusion that the relevant statutes "reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle * * * is inconsistent with the need to preserve those species." *Id.* at 745.

The general rule that "Indian treaty rights are too fundamental to be easily cast aside," *Dion*, 476 U.S. at 739, has been applied to claims that Congress eliminated a tribe's treaty rights to hunt and fish when it terminated federal supervision over the tribe, *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 410-411 (1968); that a treaty with Canada implicitly deprived a tribe of its rights under a treaty between the tribe and the United States to a portion of the run of fish on specified waters, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690-692 (1979); and that the statute granting diversity jurisdiction to the federal courts limited the authority of tribal courts to adjudicate, at least in the first instance, disputes arising on a reservation, *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 17-18 (1987). See also *Solem* v. *Bartlett*, 465 U.S. 463, 470-471 (1984); *Mattz* v. *Arnett*, 412 U.S. 481, 504-505 (1973). Indeed, the rule requiring a clear statement for abrogation of Indian rights is closely related to the more general rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); see *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 693 (1992), and is rooted in the special relationship between the United States and Indian tribes. See, *e.g.*, *Tulee* v. *Washington*, 315 U.S. 681, 684-685 (1942). Those principles are fully applicable to this case.

3. No clear intent to eliminate entirely the Tribe's authority to regulate hunting and fishing on the lands at issue here can be inferred from the Cheyenne River Oahe Act or related legislation. Indeed, both courts below agreed that the Act and legislative history are silent on the subject of the Tribe's regulatory jurisdiction over the area, although they disagreed on the consequences of that silence. Pet. App. A38-A39, A138 ("[c]ircumstances surrounding the Cheyenne River [Oahe] Act indicate that the jurisdiction issue simply was not considered"). That conclusion is correct; insofar as any congressional intent with respect to continued tribal jurisdiction can be gleaned, it was an intent to modify or eliminate tribal rights only to the extent that their continued exercise would be inconsistent with use of the land pursuant to the authorized purposes of the federal project. See generally *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988).

The Act contains a number of provisions suggesting that Congress intended not to intrude unnecessarily upon tribal rights. For example, the Tribe retains "all mineral rights of whatsoever nature" in the lands in question, subject only to regulations for the protection of the dam and reservoir, § 6, 68 Stat. 1192. The Tribe and its members also retain the right to graze stock without charge on the taken lands,[6] and the Tribal Council and tribal

[6] The United States assumed a corresponding obligation under Section 8 of the Act, 68 Stat. 1192, to take protective measures in its operation of the dam and reservoir to minimize losses to Indians with respect to their livestock that might result from the rise and fall of waters in the reservoir.

members have free access to the shoreline, including the "right to hunt and fish," subject only to "regulations governing the corresponding use by other citizens of the United States." § 10, 68 Stat. 1193. In addition, before the dam's gates were closed and the reservoir filled, members of the Tribe had the right to "cut and remove all timber" and to "salvage any portion of the improvements" on the land, § 7, 68 Stat. 1192, and to continue to reside on and use the taken lands, § 9, 68 Stat. 1192-1193. The foregoing provisions appear to have left the Tribe with rights to virtually all of the economically viable uses of the land that were consistent with its use as a reservoir.

The State argues (Pet. Br. 34-35) that the fact that tribal regulation of hunting and fishing on the former trust lands is subject to regulations governing "corresponding" use by other citizens limits the Tribe's retained rights. We agree with that proposition, as did the court of appeals (Pet. App. A42-A43); the provision expressly subjects the Tribal Council and tribal members to any federal regulations concerning the use of the reservoir by other citizens of the United States. See note 2, *supra*.

In addition, a reasonable implication of the proviso is that nonmembers ("other citizens") have a right to hunt and fish on the former trust lands—a conclusion that is supported by Section 4 of the Flood Control Act, which provides that "water areas of all such [reservoirs on federal flood control projects] shall be open to public use generally." 16 U.S.C. 460d. Thus, in our view, the court of appeals was correct in holding that the Tribe may not impose a "flat ban" or "unreasonably discriminatory limits" on nonmember hunting and fishing on the taken lands, even in the absence of federal regulations expressly barring such tribal regulations. Pet. App. A43. But the fact that Congress limited the Tribe's regulatory jurisdiction over the former trust lands in that specific manner does not establish that Congress intended *sub silentio* to outlaw *all* regulation by the Tribe. Indeed, the Tribe's

continued regulatory jurisdiction over the former trust lands is an appropriate means for the Tribe to protect the substantial continuing interests of the Tribe and its members in the taken lands.[7] In short, nothing on the face of the 1954 Act or in its primary purpose—the acquisition of lands by the United States "for the construction, protection, development, and use of" the Oahe Reservoir, 68 Stat. 1191—suggests that Congress intended to abrogate the Tribe's treaty right to regulate on-reservation hunting and fishing on those lands. The court of appeals thus correctly decided that the Tribe retained those treaty rights after 1954, notwithstanding the transfer of title to the land to the United States.

The State also argues (Pet. Br. 41-44) that the legislative history of the Cheyenne River Oahe Act supports the conclusion that Congress intended to abrogate the Tribe's treaty right to regulate hunting and fishing by nonmembers on the taken lands. The statements quoted by the State, however, all concern the amount of compensation to be paid to the Tribe for its loss of *property* rights in the taken area; they simply emphasize the point that all concerned were focusing on property interests, not on jurisdictional issues.[8] Similarly, the statement

[7] In this case, one basis for tribal regulation was the conclusion by the Tribe that state regulation did not adequately protect its grazing rights. See Pet. App. A64. Although the district court found that both members and nonmembers "may have harassed cattle grazing * * *, failed to close pasture gates, or let down wires on fences," the court found that the problems were not "so extreme and pervasive as to warrant extraordinary enforcement efforts by state or tribal game officers." Pet. App. A78. The court's recognition that hunters and fishers may have threatened the Tribe's grazing and other property interests, however, demonstrates the Tribe's continuing interest in regulating hunting and fishing, notwithstanding the court's finding that "extraordinary enforcement efforts" were not necessary.

[8] The legislative history contains only one reference to the Tribe's authority to regulate hunting and fishing. As the district court noted (Pet. App. A136-A137), the attorney for the Tribe stated

(Pet. Br. 41) from the legislative history of the 1950 Act authorizing negotiation of contracts with the Cheyenne River and Standing Rock Sioux Tribes simply confirms the expectation that the Tribes would be compensated for hunting and fishing rights "[t]o the extent that these may be impaired or destroyed." 96 Cong. Rec. 15,609 (1950). There was no suggestion that the Tribes' distinct sovereign authority to regulate hunting and fishing would be destroyed, nor is it clear what sort of compensation could be offered had Congress determined that divestiture of that regulatory authority was necessary.[9]

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quite clearly during hearings on the Act that the Tribe had authority to regulate hunting and fishing by non-Indians on its reservation. *Acquisition of Lands and Rehabilitation of Cheyenne River Sioux Reservation, South Dakota and for Other Purposes: Hearings on H.R. 2233 and S. 655 Before the Comm. on Interior and Insular Affairs Joint Senate and House Subcomm. on Indian Affairs*, 83d Cong., 2d Sess. 289 (1954) ("No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council."). Despite the fact that Congress was informed that the Tribe required nonmembers to obtain tribal licenses, however, it took no action to divest the Tribe of its regulatory power.

[9] The State is also incorrect in claiming (Pet. Br. 45) that there has been a "consistent administrative interpretation" of the Act that supports its position. The 1986 letter from Col. West, Corps of Engineers District Engineer, states only that the Corps had previously taken the position that "regulation of hunting and fishing on Corps project lands in South Dakota is a matter of state law." Pet. Br. 45. When read in context of the entire letter (see Pet'r Tr. Br. App. LL), that statement simply meant that the *Corps* did not regulate hunting and fishing on those lands. As a later letter quoted by the State (Pet. Br. 45 n.33) explains, the Corps "[took] no position as to whether the Tribe or State ultimately should have jurisdiction in this matter." Finally, the conclusion in a March 9, 1976, letter from a Corps officer that "the fish and game laws of the State of South Dakota are the only such laws that apply to these areas which were formerly owned by the Lower Brule Sioux Tribe and its members" (Pet'r Tr. Br. App. JJ, at 5) addressed lands on the Lower Brule Sioux Reservation, not the Cheyenne River Reservation. More importantly, that view was based on

4. The State's primary argument (Pet. Br. 13-30) is that this Court in *Montana* v. *United States*, 450 U.S. 544 (1981), established a general rule of federal common law that an Indian tribe has no regulatory authority over nonmembers on lands not owned by the tribe, and that Justice White's partial plurality opinion in *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), reaffirmed that rule. According to the State, the effect of that rule is to reverse the ordinary presumption governing claims that Congress abrogated a tribal treaty right. Congress's failure expressly to reaffirm the tribe's treaty rights becomes, under the State's view, a conclusive presumption that Congress overrode those rights.

In our view, the State is mistaken. In *Montana*, this Court held that the Crow Tribe did not retain authority to regulate nonmember hunting and fishing on its reservation on fee lands that were alienated to nonmembers pursuant to the General Allotment Act (the Dawes Act), ch. 119, 24 Stat. 388, and related legislation. In its analysis, the Court noted that the Tribe "arguably" obtained by treaty a right to regulate on-reservation hunting and fishing by nonmembers, but the Court held "that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U.S. at 558-559, 561. In *Montana*, the lands at issue were subsequently alienated to nonmembers of the Tribe—not, as here, to the United States—and the alienation took place pursuant to two allotment acts, which had as their intention "the dissolution of tribal affairs and jurisdiction." 450 U.S.

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the premise "[t]hat the lands acquired by the United States were severed from the Lower Brule Sioux Reservation and that the external boundaries of that reservation were reduced and diminished by the extent of the lands so acquired." *Ibid.* That premise turned out to be erroneous as to the Lower Brule Sioux Reservation, see *Lower Brule Sioux Tribe* v. *South Dakota*, 711 F.2d 809 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984), and it is erroneous as to the Cheyenne River Reservation, see Pet. App. A96-A112.

at 560 n.9. The Court was thus unable to find continued jurisdiction over nonmember hunting and fishing in *Montana* because to do so would have been inconsistent with Congress's intent in the allotment acts ultimately to eliminate tribal government itself by permitting lands gradually to be alienated out of federal and tribal ownership, to nonmembers who would not be subject to tribal authority.[10]

This Court in *Montana* accordingly did not depart from the general rule disfavoring implied abrogation of Indian treaty rights. Instead, in conformity with that general rule, the Court found that the treaty rights in question there were inconsistent with—and thus had plainly been abrogated by—the statutes under which the land had been alienated. Far from establishing a reverse presumption favoring abrogation of treaty rights, *Montana* reached the conclusion that the treaty rights were abrogated only after consideration of Congress's manifest purpose in providing for the alienation of the lands at issue.

That understanding of *Montana* was emphasized by the partial plurality opinion of Justice White in *Brendale*, on which the State heavily relies. That opinion noted the Court's statement in *Montana* that treaty rights with respect to given lands must be "read in light of the subsequent alienation of those lands." 492 U.S. at 422. The opinion then observed that the lands at issue in *Montana*, as in *Brendale*, had been alienated under the General

[10] Congress later reversed course and decided that tribal governments should be protected. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 686-687 (1992). But "Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands" and did not "encumber [the] fee-patented lands [or] impair[] the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands allotted under the Dawes Act." *Id.* at 686-687. The change of policy thus did not alter the conclusion that nonmembers who acquired the allotted lands remained free of general tribal jurisdiction. See *Montana*, 450 U.S. at 560 n.9.

Allotment Act. 492 U.S. at 423. Under the State's view, the mere fact that the land had been alienated under the Allotment Act—indeed, the mere fact that it had been alienated, regardless of the circumstances—would have been sufficient to resolve the case.

The *Brendale* partial plurality opinion, however, did not find the fact of alienation alone sufficient to account for the result. Instead, the opinion explained that the Court in *Montana* "concluded that '[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.'" 492 U.S. at 423 (quoting *Montana*, 450 U.S. at 560 n.9). The partial plurality opinion in *Brendale*, like the Court's opinion in *Montana*, thus is fully consistent with the well-settled principle that a claim of statutory abrogation of a treaty right must be resolved through careful analysis of the statute involved to determine whether there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States* v. *Dion*, 476 U.S. 734, 740 (1986). Neither the Court in *Montana* nor the partial plurality in *Brendale* minted a new rule of federal common law applicable to all lands alienated by a tribe, unanchored to the specific statutory authority for (and qualifications on) the alienation or the circumstances under which the alienation occurred.

The former trust lands that the Tribe seeks to regulate in this case were alienated pursuant to the Cheyenne River Oahe Act, not the allotment acts that formed the basis for the decision in *Montana*. By 1954, when the Cheyenne River Oahe Act was passed, the allotment regime had given way to the new policy introduced by the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, of encouraging "tribal self-determination and self-govern-

ance." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 686 (1992); see *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973); F. Cohen, *Handbook of Federal Indian Law* 216 (1942). In light of that sea change in federal Indian policy, it would be anomalous to interpret post-1934 legislation such as the Cheyenne River Oahe Act as if it had been enacted as part of the attempt to eliminate tribal government characteristic of the allotment era.[11]

The specific provisions of the Cheyenne River Oahe Act bear out the absence of any congressional intent in passing that Act to abrogate the Tribe's treaty rights.

[11] The State argues (Pet. Br. 31-32) that, when it passed the Cheyenne River Oahe Act, Congress had already moved away from its policy of encouraging tribal governance and had enacted legislation aimed at ultimate termination of federal responsibility for Indian tribes. Insofar as that policy had gained dominance by 1954, however, it was implemented not through a wholesale effort to end all tribal sovereignty, but through specific legislation explicitly terminating federal authority over specified reservations when, in Congress's view, such action was appropriate. See, *e.g.*, *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 408-410 (1968) (discussing provisions of Menominee Tribe Termination Act of 1954). The Cheyenne River Oahe Act contains not a word suggesting that ultimate termination of federal responsibility for the Tribe was envisioned; to the contrary, the Act grants the Tribe and its members substantial continuing rights on the former trust lands. It therefore cannot be interpreted as a termination act. The only evidence the State is able to muster to the contrary (Pet. Br. 32-33) are highly ambiguous statements by a single congressman, a Department of the Interior official, and the Tribe itself that suggest at most that the Tribe might be ready "in a period of possibly 10 or 15 years" for termination of federal supervision. 100 Cong. Rec. 13,160 (1954). None of those statements suggests that anyone believed that the Cheyenne River Oahe Act itself provided for termination of federal responsibility for the Tribe. Finally, as the court of appeals correctly noted (Pet. App. A9 n.7), the termination policy of the 1940s and 1950s "was aimed more at terminating the federal government's role in Indian affairs than at terminating tribal sovereignty." See R. Strickland, *et al.*, *Felix Cohen's Handbook of Federal Indian Law* 152-180 (1982).

As both courts below found, Congress's purpose was to build a dam and reservoir, not to effect a change in Indian governance. Moreover, the specific provisions of the Cheyenne River Oahe Act suggest that Congress intended to permit continued use of the lands by the Tribe and its members so far as it would be consistent with the construction and operation of the dam and reservoir. Because the analogy between the purposes and provisions of the Cheyenne River Oahe Act and the allotment acts of the late nineteenth and early twentieth century fails, the Court's conclusion in *Montana* and, in part, *Brendale*, is inapplicable in this case.

Finally, the circumstances surrounding the alienation of the land in this case are entirely different from those that surrounded the allotment acts under which the lands at issue in *Montana* and *Brendale* were alienated. Cf. *Solem* v. *Bartlett*, 465 U.S. 463, 471-472 (1984). Unlike in *Montana* and *Brendale*, no non-Indians settled on the taken lands, and thus no non-Indians acquired, with their fee titles to the land, any interest in an ability to use their private property outside the constraints of tribal jurisdiction. Accordingly, the court of appeals' finding that Congress did not abrogate the Tribe's treaty right to regulate hunting and fishing by nonmembers on the former trust lands is entirely consistent with this Court's decision in *Montana* and with the partial plurality opinion in *Brendale*.

B. The Cheyenne River Oahe Act Did Not Divest The Tribe of Its Inherent Power As Sovereign To Regulate Hunting And Fishing On The Former Trust Lands

1. Quite apart from the rights granted to the Tribe under the 1868 Fort Laramie Treaty, the Tribe's inherent rights as sovereign provide an independent basis for its authority to regulate nonmember hunting and fishing within its Reservation on the former trust lands.

It is a fundamental principle of federal Indian law that Indian tribes enjoy "inherent powers of a limited sovereignty which has never been extinguished." *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. Cohen, *Handbook of Federal Indian Law* 122 (1942)) (emphasis omitted). See *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975); *Talton* v. *Mayes*, 163 U.S. 376, 380-381 (1896); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 547-549 (1832). Those powers remain unless they are "withdrawn by treaty or statute, or by implication as a necessary result of [the tribe's] dependent status." *Wheeler*, 435 U.S. at 323.

Among the sovereign powers retained by the Tribe here, at least prior to 1954, was the authority to regulate hunting and fishing on all Indian lands within the Reservation. Because "the sovereignty retained by the Tribe under the Treaty of [1868] include[d] its right to regulate the use of its resources by members as well as nonmembers," *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 337, the Tribe could "limit[] or forbid[] non-Indian hunting and fishing on lands * * * owned by or held in trust for the Tribe or its members." *Montana* v. *United States*, 450 U.S. at 566-567.[12]

A claim that Congress has by implication divested a tribe of aspects of its inherent powers as sovereign is subject to an analytical framework similar to a claim that Congress has by implication abrogated a tribe's treaty rights. To be sure, a tribe may not exercise any power that is in conflict with federal law or that is otherwise necessarily inconsistent with its status as a

[12] As the district court noted, "[b]eginning with the passage of the Indian Reorganization Act * * *, the Tribe enacted ordinances, promulgated under the authority of Article VII of the Tribal By-Laws and approved by the Bureau of Indian Affairs (BIA), which required nonmembers to obtain a tribal permit to hunt or fish on the reservation." Pet. App. A73.

dependent sovereign; to that extent, a tribe may be divested of aspects of its inherent sovereign authority even absent an express congressional statement. See, *e.g.*, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 204, 208 (1978). Beyond that, however, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [a court should] tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978); see also *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 149-152 (1982); *Bryan* v. *Itasca County*, 426 U.S. 373, 392-393 (1976).

As we have explained above (pages 15-16, *supra*), nothing in the Cheyenne River Oahe Act suggests that Congress intended to divest the Tribe entirely of its pre-existing right to regulate nonmember hunting and fishing within the Reservation on the taken lands. A proper respect for tribal sovereignty and for Congress's primary role in this area therefore requires that, unless the exercise of the Tribe's authority would be inconsistent with its status as dependent sovereign, the Tribe's continuing right after 1954 to exercise the authority at issue in this case should be recognized.

2. The State argues (Pet. Br. 17-18) that *Montana* and the partial plurality opinion in *Brendale* establish a general rule that a tribe has no inherent sovereign powers over nonmembers on land not owned by the tribe. For this reason, it continues, the clear statement rule ordinarily applicable to a divestiture of inherent tribal sovereign powers is not applicable to this case. That contention is mistaken.

In *Montana*, this Court explained "that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*." 450 U.S. at 564 (quoting *United States* v. *Wheeler*, 435 U.S. at 326). The Court went on to conclude that the tribe had no inherent rights as sovereign to regulate "hunting and

fishing by nonmembers of a tribe on lands no longer owned by the tribe" because such regulation "bears no clear relationship to tribal self-government or internal relations." 450 U.S. at 564. See also *Brendale*, 492 U.S. at 425-428.

The Court's discussion in *Montana* must be read in the context of the circumstances of that case, which involved lands that had been alienated in fee to non-Indians—not to the United States—and where that alienation took place under the regime of the allotment acts. As the Court had already made clear in the earlier portion of the opinion in *Montana*, discussed above, it would have been inconsistent with the congressional purpose underlying the allotment acts to recognize continued general tribal sovereign authority over nonmembers who settled on fee lands that were alienated under those acts. In that setting, the relationship between the tribe and nonmember owners of the fee lands may aptly be characterized as an "external relation" of the tribe, since the nonmember owners had a reasonable expectation, entirely in accord with Congress's purpose, that they (and their invitees) would ordinarily be subject to state jurisdiction, not tribal jurisdiction, once they acquired the land. To put the point another way, it would have been inconsistent with the tribe's status as dependent sovereign for it to exercise authority that was inconsistent with an enactment of the United States, the superior sovereign.

An entirely different conclusion follows, however, with respect to the lands at issue in this case. Those lands were not alienated to private individuals (who might thereby obtain reliance interests in being free of tribal jurisdiction), but to the United States. Given the extensive involvement of the United States in matters occurring on Indian reservations and the United States' special responsibility toward Indian tribes, the acquisition of land by the United States for a federal purpose in a manner that is expressly designed to minimize the

impact on the Tribe and to restore its economic, social, and community relations (see page 4, *supra*) scarcely implies a *divestiture* of tribal jurisdiction. Moreover, the nonmembers whose conduct the Tribe seeks to regulate here are transient hunters and fishers, whose limited access to the land derives solely from (and is subject to regulation under) the federal statutes governing the federal project. They are not landowners who seek to use their own private property as they wish, in accordance with the state law that presumptively governs the use of such land generally. Conversely, although the tribes in *Montana* and *Brendale* had lost all rights in and to the use of the fee lands, the Cheyenne River Sioux Tribe was not entirely divested of its rights to use the former trust lands. It retains very substantial property interests in those lands.[13]

In sum, Congress's purpose in providing for alienation of the land—construction and operation of a dam and reservoir—is generally consistent with continued tribal sovereignty over activities taking place on the land. Because "Indian tribes retain 'attributes of sovereignty over both their members and their territory,'" *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. at 14 (quoting *United States* v. *Mazurie*, 419 U.S. at 557), the Tribe's loss of a property interest in reservation lands does not, without more, divest the Tribe of sovereign authority

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[13] Indeed, even if *Montana* and the partial plurality opinion in *Brendale* were read to draw a sharp line between tribal authority over nonmembers on "Indian" lands and tribal authority over nonmembers on "non-Indian" lands it is not clear on which side of the line the lands at issue here would fall. To be sure, the former trust lands are no longer owned entirely for the benefit of the Tribe. But the Tribe and its members retain very substantial interests in those lands (unlike the fee lands at issue in *Montana* and *Brendale*), and those interests plainly predominate over the transient interests of non-Indians to enter the lands for limited purposes.

over that territory.[14] See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 145-146; see also *Powers of Indian Tribes*, 55 Interior Dec. 14, 50, 55 (1934). Accordingly, except insofar as Congress expressly limited the Tribe's sovereign authority in the Cheyenne River Oahe Act or other applicable federal law, the Tribe retains its inherent authority over the former trust lands.

II. THE STATE'S CHALLENGE TO THE REMAND ORDER SHOULD BE REJECTED

The State and amici Montana, *et al.*, urge review of the court of appeals' remand order to the district court with respect to the former fee lands that the United States acquired from non-Indians in 1954. The court of appeals noted that the district court had attempted to determine whether non-Indian hunting and fishing on the taken area as a whole (including both former fee and former trust lands) came within either of the exceptions to the rule barring tribal jurisdiction over fee lands stated in *Montana*—namely, where the non-Indian enters into a consensual relationship with the Tribe or its members or where the non-Indian's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The court of appeals, however, treated the former trust lands and the former fee lands separately, finding that the Tribe may regulate nonmember hunting and fishing on the former trust lands but that the Tribe's authority to do so on the former fee lands depends on the application of the *Montana* exceptions. The court therefore remanded the case to the district court for it to conduct a fresh inquiry concerning the application of the *Montana* exceptions, this time limited to the former fee lands. Pet. App. A46.

Although we recognize that the Tribe did not cross-petition on this issue, we doubt that the *Montana* exceptions provide the appropriate analysis of the former fee lands in this case. Once those lands were acquired by the United States, they lost their character as private, nonmember holdings, and the rationale for prohibiting tribal jurisdiction over nonmembers on those lands disappeared.[15] In any event, the State's arguments that the remand was mistaken (Pet. Br. 47-49) essentially mirror its arguments that the court of appeals' decision regarding the former trust lands was mistaken. For the reasons given above, the court of appeals correctly decided the issue of tribal jurisdiction on the former trust lands. There accordingly is no reason to disturb the court of appeals' remand as to the former fee lands, which will at least enable the district court to reconsider the application of the *Montana* exceptions in light of the Tribe's interests in and regulatory authority over the former trust lands.[16]

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[14] The State attempts (Pet. Br. 24-25) to justify a rule that would divest tribes of all authority over nonmembers who do not consent to tribal authority by pointing to the fact that nonmembers have no voice in setting tribal policy. But the State is surely wrong in suggesting that hunters and fishers must have a voice in the making of regulations in whatever jurisdiction they choose to conduct their activities. Whatever the validity of that rationale with respect to nonmembers who live within a reservation, it has little relevance to the facts of this case.

[15] Indeed, Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, provides for reacquisition of fee lands and their reconveyance to the Tribe. There is no reason to treat lands reconveyed pursuant to that provision as fee lands for purposes of determining whether the *Montana* rule generally prohibiting tribal jurisdiction applies. Similarly, there appears to be no reason to treat the former fee lands in this case as exempt from tribal jurisdiction.

[16] Citing the partial plurality opinion in *Brendale*, 492 U.S. at 431, the State suggests (Pet. Br. 49) in passing that the Tribe would not have regulatory jurisdiction over the former fee lands even if the *Montana* exceptions were satisfied here, but would instead have only a cause of action in federal court to protect against the threat to its interests. That issue is premature, because it

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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would arise only if the district court finds on remand that the Tribe can make the necessary *Montana* showing as to the former fee lands. In any event, the Court in *Brendale* did not adopt the partial plurality's views on this point. See 492 U.S. at 444 (opinion of Stevens, J.); *id.* at 460 (opinion of Blackmun, J.). And the plurality's views themselves were stated in the context of a zoning dispute, not regulation of hunting and fishing. The Tribe can hardly be expected to protect its interests by filing a federal lawsuit against every transient hunter or fisher whose conduct threatens the Tribe's interests. This case therefore would appear to be governed by the plain language of the Court's opinion in *Montana*, which did involve regulation of hunting and fishing. See 450 U.S. at 566 ("[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").

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